APPENDIX

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Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-370

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—v.—

FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 30, 1973
CERTIORARI GRANTED DECEMBER 3, 1973

Supreme Court of the United States

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[The second opinion and judgment of the Court of Appeals and the Board's initial and supplemental decisions and orders were printed either in the petition for a writ of certiorari or in the opposition thereto, and therefore have not been reprinted.]

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

In the Matter of: Food Store Employees Union, Local No. 347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO

Case Nos.: 6-CA-3989 and 6-RM-326

7.18.67	Charge filed in Case No. 6-CA-3989
7.18.67	Union's objections to election in Case No. 6-RM-326, dated
8.22.67	Amended charge filed in Case No. 6-CA-3989
12.26.67	Complaint and notice of hearing in Case No. 6-CA-3989, dated
12.28.67	Regional Director's order directing hearing on objections and notice of hearing in Case No. 6-RM-326, dated
12.28.67	Regional Director's order consolidating cases, dated
1. 4.68	Heck's Inc's answer to complaint, received
2.27.68	Hearing opened
3.14.68	Hearing closed
5. 7.68	Trial Examiner's Decision, issued
5.31.68	Heck's Inc.'s exceptions to the Trial Examiner's Decision, received
6.11.68	Union's cross-exceptions to the Trial Examiner's Decision, received
6.12.68	General Counsel's cross-exceptions to the Trial Examiner's Decision, received
9.24.68	Decision and Order issued by the National Labor Relations Board

RELEVANT DOCKET ENTRIES—Continued

5. 4.70	Decision of Court of Appeals, for District of Columbia, filed
8.11.70	Heck's motion for oral argument, received
8.27.70	Food Store Employees Union (hereinafter referred to as Union) response to motion for oral argument, received
10. 6.70	Board's Notice to parties to file statement of position, dated
11. 2.70	Heck's statement of position on the remand, received
11. 3.70	Union's statement of position on the remand, received
11.16.70	General Counsel's statement of position on the remand, received
12. 2.70	Union's response to the General Counsel's statement of position, received
7. 1.71	Supplemental Decision and Amended Order isued by the National Labor Relations Board, dated
3.21.73	Supplemental Decision of Court of Appeals for District of Columbia, filed
12. 3.73	Order of the Supreme Court granting certiorari, dated

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Case 6-CA-3989

HECK'S, INC.

and

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, FOOD STORE EMPLOYEES UNION, LOCAL NO. 347, AFL-CIO

Case 6-RM-326

HECK'S, INC., EMPLOYER AND PETITIONER

and

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, FOOD STORE EMPLOYEES UNION, LOCAL NO. 347, AFL-CIO

F. J. Surprenant, Esq., and *Harold Datz, Esq.*, for the General Counsel.

Fred F. Holroyd, Esq., of Charleston, W. Va., for Heck's, Inc.

Albert Gore, Esq. (Jacobs & Gore), of Chicago, Ill., and *Mr. Ronald Skaggs*, of Charleston, W. Va., for the Charging Party—Labor Organization.

Before *Frederick U. Reel*, Trial Examiner.

TRIAL EXAMINER'S DECISION

Statement of the Case

These cases, consolidated by order of the Regional Director[1] and heard at Clarksburg, West Virginia, on

[1] The charge was filed July 13, 1967, and the complaint issued December 26. The petition in the RM case was filed May 29, 1967, and

February 27, and March 5, 6, and 14, 1968,[2] present questions as to whether Heck's, Inc., herein called the Company, engaged in acts of interference, restraint, and coercion in violation of Section 8(a)(1) of the National Labor Relations Act, as amended, whether its refusal to bargain with the Charging Party (herein called the Union) violated Section 8(a)(5) of the Act, and whether a Board-conducted election, which the Union lost by a vote of 19 to 16, should be set aside because of allegedly improper conduct affecting the result of the election. Upon the entire record,[3] including my observation of the witnesses and after due consideration of the briefs timely filed by each of the parties, I make the following:

Findings of Fact

I. The Business of the Company, and the Labor Organization Involved

The Company, a West Virginia corporation, operates a retail store in Clarksburg as well as stores in other cities in West Virginia and Kentucky. Its annual gross sales exceed $500,000, and it received goods and products valued in excess of $500,000 directly from outside the State of West Virginia for use at its West Virginia stores. These facts establish, and the Company admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

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the election was held July 13. Objections were filed July 19, 1967, and the report thereon issued December 28, the same day on which the two proceedings were consolidated.

[2] All other dates herein refer to the year 1967 unless otherwise noted.

[3] I take official notice of other proceedings before the Board involving this Respondent, including the letter from Regional Director Getreu dated March 29, 1968, in Case 9-CA-4472. The "Motion to take judicial notice" which accompanied Respondent's brief is hereby granted.

II. The Unfair Labor Practices

A. *Interference, Restraint, and Coercion*

1. The evidence in support of the allegations

The Union commenced an organizing drive among the Company's Clarksburg employees in May 1967, culminating in an election on July 13, which the Union lost, 19 to 16. During this period the Company openly and vigorously opposed the Union's efforts. The question is whether, and to what extent, the Company overstepped legal limitations during this period and its immediate aftermath.

Several employees (Robin Webb, Mary Johnson, and Beverly Davis) testified that during this period Frances Jones, head cashier and concededly a supervisor, frequently asked each of them whether they had attended union meetings and where the meetings were held. Each of them also testified that Jones had stated to her that if the Union became the bargaining representative, Company President Fred Haddad would close the store. Several other employees (Marsha Mason, Sharon Kimble, and Pamela Jeffers) testified to separate occasions on which Bill Pulice, a department head and admitted supervisor, stated that Haddad would close the store if the Union came in.

Pulice also figured in an incident of alleged unlawful surveillance of union activity. A mid-June union meeting was scheduled for shortly after 10 p.m., the store's closing time, at the Truck-O-Tel, a restaurant on the main highway leading from the store to downtown Clarksburg. Several employees, congregating outside before the meeting, saw Pulice drive past three times (i.e., first toward town, then back toward the store, and then toward town again), and noted that he was driving at a slow rate of speed and that he turned his head toward the restaurant so as to see who was there. The meeting was transferred to a nearby bowling alley on the same highway because, as employee Terry Smith testified, "so many members showed up and we had to go—and also have some privacy." Smith further testified that a day or two later

Warehouse Manager Surock, a supervisor, asked him whether he had bowled a good game the other night. Smith rejoined that Surock knew Smith had not gone to bowl but to a union meeting. Surock then asked, according to Smith, "Did you all accomplish anything?" and when Smith did not reply, Surock added: "Well, you are going to be sorry of it," and walked away.

According to the testimony of both Marsha Mason and Pamela Jeffers, Company President Haddad approached them one day in June while they were working together, and initiated a discussion with them as to why Montgomery Ward had recently closed its Clarksburg store. After the two employees expressed their opinion, Haddad told them (so they testified) that they were wrong, that the store had closed because of union activity, and that he would close this store if the Union came in. He then told the two employees that he was going to transfer them to another store because they had been "bad girls."

Employee Cynthia Marsh testified that shortly before the election one of the supervisors, Ella Morris, asked her how she was going to vote in the election, and that she replied that she did not know. Marsh also testified to a conversation with Company Vice President Ray Darnall the night before the election in which Darnall told her that the Clarksburg store was making "just enough money . . . to keep going, keep their heads above water . . . ." Marsh further attributed to Darnall in this conversation the statement that the store "might have to close down" if the Union prevailed.

During May, the same month in which the Union first demanded recognition as bargaining representative, and well after the Company, by posting a letter to all employees on its bulletin board, had made known its strong opposition to the Union, Vice President Darnall conducted a poll of the employees. He approached each employee individually, and handed the employee a slip of paper reading as follows:

> I am sure that you are aware that the Food Store Employees Union are trying to organize this store. I would like to ask you if you want the Union to

represent you. You do not have to answer if you do not want to. This will have no bearing on your job.

Name _____

Yes ( ) No ( ) No Comment ( )

Please sign and check one. Thanks

Each employee signed and marked this "ballot" in Darnall's prsence and returned it to him.[4]

During May, June, and July, the Company dispatched several written communications to its employees stressing the Company's opposition to the Union. The literature, which is in evidence as General Counsel's Exhibits 3 through 11, in my judgment manages to stay within the area of views, argument, and opinion permitted by Section 8(c) of the Act. Cf. *National Food Stores, Inc., t/a Big Bear Super Markets*, 169 NLRB No. 12.

After the Company rejected the Union's demand for recognition, the Company filed a petition with the Board culminating in an election on July 13. The balloting was conducted in the lounge which was separated from the store by the warehouse, so that employees leaving their work to go to vote passed through the warehouse. Before the voting commenced, a number of company officials and some union representatives were in the warehouse. The Board agent conducting the election directed them to go out of the warehouse before the polls opened, and they complied with this directive. During the balloting the warehouse door was closed. However, the employees going to and from the polls passed the waiting groups of company and union officials, and some conversations occurred between employees and one or both of the groups. The complaint alleged that the Company violated the Act by "positioning [supervisors] in the store in such a way as to insure that employees on their way to the polling place would have to walk past them." At the conclusion of General Counsel's and Charging Party's case, I granted the Company's motion to dismiss this allegation for failure to establish a *prima facie* case.

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[4] The tally showed 11 yes, 13 no, and 6 no comment. Three employees were not polled.

The Union lost the election, held July 13, by a vote of 19 to 16 with 1 ballot challenged.[5] After the filing of the unfair labor practice charge and the objections to the election, Company Counsel Holroyd, in the presence of Vice President Darnall, interviewed a number of employees, individually, in the store manager's office. Holroyd explained to the employees that he was interviewing them because of the charges and objections filed with the Board. He then proceeded to ask them whether their working rules had been changed in June 1967, and also whether any supervisor had (a) stated that the Union put Montgomery Ward out of business in Clarksburg, or (b) stated that Heck's would close before it let a union in, or (c) asked about attendance at a union meeting, or (d) asked how the employees would vote in the election. Holroyd noted the employees' answers on a mimeographed form he had prepared, and asked each of the interviewed employees to swear to and sign the completed form. Several employees declined to do so, and one (James McPherson) testified that Holroyd said, "I can make you sign."

2. Concluding findings

The threats, attributed to Jones, Pulice, and Haddad, that the store would close if the Union came in, would manifestly violate Section 8(a)(1) of the Act. In each case the employer-representative, called as a witness, denied the threat. Similarly, Morris denied questioning Marsh as to how Marsh intended to vote. These conflicts in the testimony I resolve in favor of General Counsel's witnesses, for reasons summarized below.

The various employee witnesses, whose testimony I credit, impressed me as testifying carefully, with high regard for the truth and with considerable corroborative detail. Also I note that in many instances their testi-

[5] Company Vice President Darnall promptly dispatched a telegram to each of the other stores in the Heck chain, advising them that the Union had lost the election "by an overwhelming majority" and directing them to post the telegram on their bulletin boards. A similar telegram was sent from the Company's Kanawha City store to the Clarksburg store following a poll of the Kanawha City employees which Darnall conducted.

mony attributing illegal interrogation and threats to supervisors was consistent with statements that they gave (according to their uncontradicted testimony) to Company Counsel Holroyd when he interviewed them after the election.[6]

In contrast to the employee witnesses whom I credit, I found Jones, Pulice, and Haddad less than fully believable. In addition to the matter of demeanor I note the following: (1) Jones testified that she had never discussed the matters to which she testified with anyone, that she did not even know she was to testify at all until about 2:45 p.m. on the day she took the stand, and that when she called the store manager earlier that day he had said he did not know whether she would be called. The story strikes me as incredible, for Jones had repeatedly been named as a perpetrator of unlawful conduct as far back as the previous July, and she had figured prominently in the testimony of General Counsel's witnesses a week before she took the stand. Moreover company counsel had expected to finish his entire case by noon, so that if Jones' story is to be believed, but for the unexpected delay in finishing the Company's case, she would never have been called and the accusations against her would have gone unrebutted. Finally, Surock testified that the store manager told him at 9 a.m. that day that Surock, Jones, and another supervisor would be testifying that day, which casts some shadow over Jones' testimony that at noon the store manager was uncertain. These matters serve to reinforce the unfavorable judgment I formed of Jones' credibility. (2) Haddad parried an inordinate number of questions by saying "I don't recall," but managed to recollect that he had discussed with some employees the "rumor" that Montgomery Ward's closing was caused by the Union. His statement that he "kidded" with the employees furnishes no defense to a threat to transfer "bad girls," uttered in a context of antiunion statements. *A. P. Green Fire Brick Company* v. *N.L.R.B.*, 326 F.2d 910, 914 (C.A. 8). In any

[6] Employee Kimble's testimony was contrary to the statement she gave Holroyed. She repudiated that statement and explained twice that she was "very nervous" when Holroyd interviewed her.

event, I also credit the employees' testimony over Haddad's denial that he threatened to follow Montgomery Ward's example and close the store if the Union came in, and this statement alone would establish unlawful coercion by the Company. (3) I had more difficulty assessing the credibility of Pulice than I had in forming the conclusion that Jones and Haddad were not reliable witnesses. Pulice "explained" the surveillance attributed to him, because he recalled that on that day, some 9 months before he testified, he had left the store and started for home when he realized he had forgotten a package at the store, so that he returned to the store and then retraced his route toward home. This circumstance brought him past the union meeting place three times, and he thought he "probably looked over" to the group of employees there, although he averred that he had driven past at his normal rate of about 30 miles per hour. Indeed, Pulice's recollection of the events was so vivid that he remembered that on his way back to the store he passed a truck just as he went by the meeting place, so that he did not see the employees on that leg of his trip. As Pulice drives this route two or three times a day, and frequently passes trucks, his recollection of this particular vehicle as blocking his view suggests either a fabulous memory or some greater interest in the identity of those at the meeting place than he was willing to admit. In any event, to return to the question of Pulice's credibility *vis-a-vis* the employees who testified to his threats that the store would close if the Union came in, the testimony of Kimble, Jeffers, and Mason in describing their conversations with Pulice impressed me as truthful. I have credited their testimony in other respects, and while I am not as firm in my conviction that Pulice is to be discredited as I am in dealing with Jones and Haddad, I shall resolve this close issue in favor of the employee witnesses.

As to the similar threat which employee Marsh attributed to Vice President Darnall, I note that Marsh first testified she was "not sure" as to Darnall's comments because "it's been so long ago." When asked what Darnall had said "would happen if the Union came in,"

she replied: "The store might have to close down, I guess." In the light of this testimony, I credit Darnall's denial that he uttered the explicit threat. Darnall testified, however, that he had a conversation with Marsh the night before the election in which he explained the store's parlous existence in terms of its narrow margin of profit. Such a conversation, on the eve of an election between a highly placed company executive and a newly hired cashier of itself suggests that the employer representative was "campaigning" but I am not prepared to find that he overstepped the line between argument and threat. I credit Marsh's testimony that Morris interrogated her, however, for Marsh did not qualify her testimony with respect to Morris as she did with respect to Darnall, and Morris' overeagerness to deny all allegations, even before the question was asked, did not inspire confidence in her veracity. Also it is possible that Morris forgot her conversation with Marsh, for Morris apparently did not even recall later conversations with Holroyd.

As to the surveillance episode, discussed above, the Union cannot be heard to complain, if it chooses to hold its meetings in a prominent spot on a well-traveled road, merely because management representatives drive by, and even if they turn their heads toward the gathering. Pulice's explanation that he had to retrace his steps that evening and hence passed the spot three times is not so incredible as to require rejection. Pulice's recollection that a truck he was passing blocked his view suggests he had a high degree of interest in learning who was at the meeting place, although, if credited, it tends to support his estimate of his speed rather than the abnormally slow rate the employee witnesses attributed to him. In any event, I find that Pulice's presence in the area was occasioned by legitimate purposes of his own rather than by a desire to spy on the meeting. Similarly, Surock's alleged knowledge (which he denied) that the employees were having a union meeting at a bowling alley would not establish that he or anyone else in management had spied on the meeting. I therefore dismiss the allegation of unlawful surveillance.

Darnall's poll of the employees as to their pro or anti-union sentiments seems to be palpably illegal. This was not casual or isolated interrogation, but involved the employer's making of a written record as to the union views of every employee. Such polling, when held lawful, has always been by secret ballot, and the requirement here that the employee sign the "ballot" stamps the entire episode as illegal. See *N.L.R.B.* v. *Protein Blenders, Inc.*, 215 F.2d 749 (C.A. 8); *N.L.R.B.* v. *Roberts Brothers*, 225 F.2d 58 (C.A. 9); *N.L.R.B.* v. *Russell Kingston*, 172 F.2d 771 (C.A. 6).

The interviews which Holroyd conducted after the election apparently were for the lawful purpose of enabling the Company to meet the charge and the objections to the election. Nevertheless, certain important safeguards which the Board and the courts have said should accompany such interviews were lacking. I note, for example, that the employees were not assured that no reprisal would take place, that their participation was not on a voluntary basis, that they were asked to swear to an affidavit setting forth their answers to Holroyd's questions, and that at least one of them was so nervous as to give incorrect statements in response to Holroyd's inquiries. On the other hand, not all the employees called into the office answered Holroyd's questions, and of those who did, several refused to sign. Under all the circumstances, and considering also the general antiunion atmosphere, I find Holroyd's interviews exceeded legitimate bounds, because of his failure to reassure the employees that they were free not to cooperate without prejudice to their jobs and because he attempted to get them to swear to their statements. See *N.L.R.B.* v. *Neuhoff Brothers Packers, Inc.*, 375 F.2d 373, 377-378 (C.A. 5). The interviews by Holroyd, a company agent, in the presence of other company supervisors thus violated Section 8(a)(1), although the matter is somewhat cumulative in the light of Darnall's earlier unlawful poll. I find that McPherson misunderstood Holroyd, and that the latter did not say "I can make you sign."

In sum, I find that the threats of Jones, Haddad, and Pulice, the interrogation by Morris, the polling by Dar-

nall, and the postelection interviews by Holroyd constituted interference, restraint, and coercion in violation of Section 8(a)(1) of the Act.

B. *The Refusal to Bargain*

1. The Union's majority status

The Union made a telegraphic request of the Company for recognition on May 20, and repeated the request orally on June 13. Both requests were refused, as the Company expressed a doubt of the Union's majority and stated that the matter should be resolved by an election. By May 20, the Union had obtained cards from 19 of the 33 employees then in the bargaining unit,[7] and by June 13, it held cards from 23 of the 38 then in the unit.[8] The Company introduced testimony which, if fully credited and given its broadest possible sweep, would cause me to reject three or four of the Union's cards. For reasons developed below, I find that all cards, including those brought into question by the Company, were valid.

The Company produced two employee witnesses, Alice Neely and Avis Wetzel, who testified that they signed their cards after the union organizer told them, separately, they would lose their jobs if they did not. Neely, moreover, was accompanied in the interview with the union organizer by another employee, Evelyn Carpenter, who signed at the same time and, according to Neely, after the same threats. The fourth card under attack is that of employee Ursel Strosnider, who was confined to a hospital during the hearing, but who, the record suggests, would not have signed a card but for Wetzel's having done so. There is also a suggestion in the testimony that Strosnider told Neely that she (Strosnider) signed out of fear, but this is not probative evidence of Strosnider's motivation.

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[7] The stipulated bargaining unit includes all the employees in the Clarksburg store except for supervisors, guards, and professional employees.

[8] The Union obtained 5 new cards between May 20 and June 13, but one of the original 19 had left the Company by the latter date.

Neely, whose credibility is difficult to assess in view of her admittedly nervous state while testifying, stated that for some days before they signed cards, she and Carpenter had been followed, as they drove through Clarksburg, by a car containing the union organizers. On one occasion, according to Neely, a rock struck her car, and she was sure it was thrown from the car following her. (I accept and credit the testimony of the union representatives that they did not engage in any car-following or rock-throwing, but I will accept Neely's statement that she believed these men had followed her car and thrown a rock. This may involve some stretching of credulity, for Neely also testified that she knew the union men wanted to see her as they had so informed her husband, and a normal person might reason that if they pursued so routine a method of approaching her they would not have resorted to shadowing, pursuing, and rock-throwing. But Neely did not impress me as "normal" and I will credit her testimony that she held this bizarre and unfounded belief.)

On May 18, at the suggestion of a fellow employee who supported the Union, Neely and Carpenter met with one or two fellow employees and the union organizers at a restaurant after work. Neely testified that before going to this meeting, she and Carpenter had decided to sign union cards "if they [the Union] had anything to offer us and various things like that when we talked it over, saw what they had to offer." During the conversation at this meeting, which lasted over an hour, Neely asked a number of questions dealing with possible union benefits, such as retirement and insurance, and how long she would have to be a member before obtaining these benefits. In the course of the conversation the union representatives told the two employees that when the Union became the bargaining representative and obtained a contract "after 30 days all employees at the place would belong to the Union." [9]

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[9] I do not credit Neely's testimony that the organizers told her that if she failed to sign the card she "could lose [her] job with the Company."

A fair summation of Neely's testimony is that, whatever her fears may have been, she went to meet the union organizers, discussed possible union benefits at some length, learned that if the Union obtained a contract union membership would probably become a condition of employment, and signed the card. I find nothing in this to lead me to eliminate Neely, or her companion Carpenter, from the list of those supporting the Union at the time it claimed recognition. I note also that Neely marked Darnall's "ballot" as to show her support of the Union. Neely testified that she told Darnall at the time that she had signed a union card "under pressure." Darnall's testimony contains no mention of any such comment by Neely, and I credit the testimony of employee Davis that she overheard the exchange between Neely and Darnall and that no such remark was made. Neely's testimony reveals a determination, as of the date of the hearing, to oppose the Union, but her recollection of the events of the preceding May and June appears highly colored by her frame of mind at the time of testimony. This comment also applies to Wetzel, whose testimony is discussed below. Curiously both Neely and Wetzel positively named one of the union organizers who interviewed them as one Huffman, although the record conclusively establishes that the man in question was Carl Lambert, and that Huffman, another organizer, had left the city by the date in question. Why Neely swore the man was Huffman is not explained on the record, but Wetzel testified that her recollection to this effect had recently been refreshed by Holroyd. I note that Huffman's name did appear in the record and in exhibits received in evidence on the first day of the hearing, and that Wetzel and Neely did not testify until a week later. I do not believe that Neely willfully testified falsely, but her nervous condition and the general tenor of her testimony lead me not to credit her where there is probative evidence contrary to that which she gave.

Wetzel testified that in her meeting with the union organizers she first expressed fears, which they assuaged, that if she signed for the Union, the Company would discharge her. The meeting in Wetzel's home lasted over

90 minutes, and according to Wetzel she finally signed the card when the organizers told her that "the Union is going in . . . and when it gets in [she would] have to join the Union to keep [her] job." I credit the testimony of Lambert and Skaggs, the two union organizers, that they explained to Wetzel and to Neely that once the Union obtained recognition it expected to obtain a contract which would require employees to join in 30 days.

I find nothing in the above which suggests that the Union obtained Wetzel's card by improper means. Moreover, Wetzel apparently attended several union meetings, (even during inclement weather which kept others away) at which she spoke in favor of the Union, and she marked Darnall's "ballot" for the Union, although she explained to him she had been "more or less pushed into" signing a union card. Finally, Wetzel herself testified that she telephoned Strosnider while the union organizers were at Wetzel's house and said: "I signed. I don't know what you are going to do. If you want to sign, that's up to you. I suppose I might as well lose my job one way as well as another." This statement furnishes no basis for not including Strosnider's card as a valid designation of the Union.

In short, I find that all the cards held by the Union were valid designations, and that it represented a majority of the employees at the time it requested, and the Company refused, recognition.

2. The Company's asserted doubt of the Union's majority

On May 25 the Company relied to the Union's May 20 request for recognition, stating that "a majority of the employees have advised the Company that they did not desire your union to represent them," and adding that the Company had filed a petition with the Board so that the question of majority status could be determined by secret ballot. Again on June 13 the Company adhered to its determination to seek an election rather than to determine the Union's majority by card check, as the Union offered. The reference on May 25 to what the employees had told the Company was apparently a some-

what inaccurate representation of the results of Darnall's poll, which showed 11 for, 13 against, and 6 "no comment."

The Company in at least three preceding cases arising in other stores had been confronted with claims of union majorities, but in subsequent proceedings had successfully resisted the Union's attempt to obtain enforceable bargaining orders. See *Heck's, Inc.*, 159 NLRB 1151; 159 NLRB 1331; *N.L.R.B.* v. *Heck's, Inc.*, 386 F.2d 317 (C.A. 4) In the light of this background the Company's reluctance to recognize the Union pursuant to the latter's claim of a majority based on authorization cards is certainly understandable, to say the least. There is some evidence, denied by company witnesses, that Haddad believed as of July 6 that the Union had cards from a majority, but this would not distinguish this case from that reported at 159 NLRB 1331, 1334-35. The closeness of the vote obtained by Darnall in his poll might give rise to some question as to whether the Company doubted the majority in good faith, for the "no comment" votes under the circumstances might be interpreted as pro-union. Also, the fact that the Company engaged in unfair labor practices between the time of the bargaining request and the election may warrant an inference that it sought the election to gain time in which to dissipate the majority.

Although the record thus discloses some basis for a finding that the Company did not have a good-faith doubt of majority, I am not persuaded that the preponderance of the evidence leads to that result. I note that the Company did expedite the election by filing the petition, and I am particularly influenced by the fact that in prior cases the Company's challenge to card majorities proved well-founded. For reasons set forth below, however, I find that a bargaining order should issue to remedy the Section 8(a)(1) violations found above.

As already noted the Union did in fact represent a majority prior to the Company's unfair labor practices, and indeed lost the election by only a narrow margin after the Company committed various illegal acts. At least

six employees, nearly one-fifth of the entire bargaining unit, were threatened by supervisors that advent of the Union would result in closing of the store. (Even company witnesses Neely and Wetzel testified that employees were afraid of being discharged if the Company learned they signed union cards.) Under these circumstances it is reasonable to infer, and I do, that the unfair labor practices destroyed the Union's previously existing majority status. A proper remedy for those unfair labor practices is to restore the Union to its majority status, with the consequent imposition on the Company of a duty to recognize the Union and bargain with it upon request. See, e.g., *N.L.R.B.* v. *Delight Bakery, Inc.*, 353 F.2d 344, 347 (C.A 6)

Conclusions of Law

1. The Company by interrogating its employees as to their union activity, polling them in a nonsecret ballot to ascertain which employees supported the Union, and threatening to close the store if the Union became the bargaining representative, engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and 2(6) and (7) of the Act, and tended to dissipate the majority status which the Union enjoyed prior to the unfair labor practices.

2. By interviewing employees under coercive circumstances concerning matters relating to unfair labor practice charged and objections to an election the Company engaged in further unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and 2(6) and (7) of the Act.

The Remedy

I shall, of course, recommend that the Company cease and desist from violating Section 8(a)(1) of the Act, and that it recognize and bargain with the Union as the representative of the Clarksburg employees.

As previously noted, the Company has a number of stores; it opened its 11th store during one of the recesses in this hearing. Its headquarters is in Charleston, West Virginia, and basic labor policy for all the stores is determined there by Messrs. Haddad, Darnall, and Holroyd.

That the Company itself recognizes a relationship between events occurring at different stores is shown by its conduct in immediately sending a telegram to all other stores, for posting on their bulletin boards, after the Union's defeat in the election at Clarksburg.[10] Similarly the Company sent a telegram to its Clarksburg store to advise of the result of its own employee poll at its Kanawha City store. In the light of those facts, and in consideration of the fact that there are eight previous Board orders finding violations at various stores in the Heck's chain,[11] I believe that the order should be broad enough to restrain future violations of Section 8(a)(1) at any and all of the stores owned by Heck's. See *N.L.R.B.* v. *Heck's, Inc.*, 388 F.2d 668, 669 (C.A. 4).

The Union in its brief makes several suggestions as to further remedies. It asks that a general bargaining order issue covering all Heck's stores, so that (assuming court enforcement in this case) any postdecree refusal to bargain in any store will be at the risk of a contempt proceeding. Assuming *arguendo* that such relief might be appropriate in a proper case, I decline to recommend it here, as at this writing there is no outstanding judicially enforced bargaining order against the Company. Assuming that the order here recommended later becomes embodied in a court decree, a sufficiently virulent showing of a bad-faith refusal to bargain might lead to a contempt prosecution under the provisions of the order prohibiting interference with the Section 7 right to bargain collectively. The Union also asks that General Counsel be directed to seek injunctive relief in any future case involving Heck's. This matter should be left to case-by-case determination; General Counsel will not be unaware of the Company's history if subsequent complaints should issue, and the Union may make appropriate requests in

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[10] The telegram states that the employees voted by an "overwhelming" majority to reject the Union. As the actual vote was 19 to 16, the use of the term "overwhelming" suggests that the Company was engaging in propaganda at the other stores, and using the Clarksburg election for that purpose.

[11] See 150 NLRB 1565; 156 NLRB 760; 158 NLRB 121; 159 NLRB 1151; 159 NLRB 1331; 166 NLRB Nos. 32, 38; 170 NLRB No. 53.

such cases. The Union asks that in future cases against Heck's the Company should shoulder the burden of proving that it had a good-faith doubt of majority. I have grave doubt that the Board has power to shift the burden of proof in cases not yet before it.

With respect to this particular case the Union urges that the Company be required to bargain over the conditions of employment prevailing from the date of the violation to the effective date of the new contract. I see no need to particularize this part of the remedy, for the Union is free to bargain over the effective date and can therefore bargain for retroactivity. Cf. *Independent Drugstore Owners of Santa Clara County*, 170 NLRB No. 195. Finally, I decline to recommend that the Union be reimbursed for its expenses in filing the charge in this case, or in participating in the litigation. See *M.F.A. Milling Company*, 170 NLRB No. 111, TXD, "The Remedy."

Finally, in the light of the foregoing and in view of the bargaining order recommended in this case, I find it unnecessary to pass upon certain additional conduct alleged to have affected the results of the election. I recommend that the election be set aside and the representation proceeding be vacated.

Accordingly, upon the foregoing findings and conclusions, and upon the entire record in this case, I recommend, pursuant to Section 10(c) of the Act, issuance of the following:

ORDER

A. Respondent Heck's, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist at each and all of its stores from interrogating employees as to their union membership, sympathies, or activities; threatening employees that choice of a union as their collective-bargaining representative would lead to the closing of the store; or in any other manner interfering with, restraining, or coercing employees in th exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively (as defined in Section 8(d) of the Act) with Amalgamated Meat Cutters and Butcher Workmen of North America, Food Store Employees Union, Local No. 347, AFL-CIO, as the representative of all employees of the Respondent's Clarksburg, West Virginia, store, excluding supervisors, guards, and professional employees.

(b) Post at each of its retail stores, copies of the attached notice marked "Appendix." [12] Copies of such notice on forms provided by the Regional Director for Region 6, after being duly signed by an authorized representative of the Respondent, shall be posted immediately upon receipt thereof, and shall be maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Decision, what steps the Respondent has taken to comply herewith.[13]

B. The election in Case 6-RM-326 is set aside, and that proceeding is hereby vacated.

Dated at Washington, D.C. May 7, 1968

[Certified True Copy
O. W. Fields
Executive Secretary, NLRB
Date May 7, 1968]

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[12] In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

[13] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

All our employees have the right to self-organization, to form, join, or assist labor unions, and to bargain collectively through representatives of their own choosing.

WE WILL NOT threaten to close any store because our employees select a union to represent them, or question our employees concerning their union sympathies or activities or membership, or in any other manner interfere with their exercise of those rights.

WE WILL recognize Amalgamated Meat Cutters and Butcher Workmen of North America, Food Store Employees Union, Local No. 347, AFL-CIO, as the bargaining representative of the employees in our Clarksburg, West Virginia, store. At the request of that Union we will bargain with it in good faith with respect to the terms and conditions of employment of the employees in that store, and we will embody in a signed contract any agreement reached.

HECK'S, INC.

(Employer)

Dated ——— By ———
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 1536 Federal Building, 1000 Liberty Avenue, Pittsburgh, Pennsylvania 15222, Telephone 644-2977.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,318

FOOD STORE EMPLOYEES UNION, LOCAL NO. 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 22,414

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HECK'S INCORPORATED, RESPONDENT
FOOD STORE EMPLOYEES, UNION, LOCAL 347, ETC., INTERVENOR

On Petition for Review and Application for Enforcement of an Order of the National Labor Relations Board

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Decided May 4, 1970

Miss Judith A. Lonnquist, with whom *Messrs. Mozart G. Ratner* and *Albert Gore* were on the brief, for petitioner in No. 22,318 and intervenor in No. 22,414.

Mr. Baruch A. Fellner, Attorney, National Labor Relations Board, for petitioner in No. 22,414 and respondent in No. 22,318. *Messrs. Arnold Ordman*, General Counsel, National Labor Relations Board, *Dominick L. Manoli*, Associate General Counsel, and *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, were on the brief, for petitioner in No. 22,414 and respondent in No. 22,318.

Mr. Frederick F. Holroyd for respondent in No. 22,414.

Before: BAZELON, *Chief Judge*, MCGOWAN and LEVENTHAL, *Circuit Judges*.

PER CURIAM: This case arises on petitions to review and to enforce an order of the National Labor Relations Board against Heck's Inc., relating to its store at Clarksburg, West Virginia. The Board found (1) that Heck's had violated § 8(a)(1) of the National Labor Relations Act (29 U.S.C. § 158(a)(1)) by unlawfully questioning and threatening its employees concerning the Food Store Employees Union ("the Union") and by polling its employees by non-secret ballot to determine their support for the Union; (2) that Heck's had violated § 8(a)(1) and § 8(a)(5) of the Act (29 U.S.C. §§ 158(a)(1), 158(a)(5)) by refusing to bargain with the Union despite the existence of valid cards showing a majority of the store's employees as favoring the Union; and (3) that the appropriate remedy for Heck's refusal to bargain was an order to bargain.[1] The Board's decision and order are reported at 172 NLRB 255.

Heck's contends that the evidence was insufficient to support the Board's findings and that the order to bargain was inappropriate. The Union urges that the relief provided by the Board was insufficient to overcome the harm inflicted.

It is not necessary to review the evidence in detail in this opinion. The decision of the Board (including that of the Examiner) has already done so, and we find that the evidence there recited is supported by the record and more than meets the substantial evidence test for upholding Board findings.[2] Similarly, the Board's remedy falls

[1] The Board's order contains a few other times, most important of which are those dealing with protection of Heck's employees from interrogation and denial of section 7 rights. These remedies are clearly appropriate.

[2] General Teamsters and Allied Workers v. NLRB [*Pennsylvania Glass Sand Corp.*], Nos. 22,072, 22,762, 138 U.S.App.D.C. 312, 427 F.2d 582 (April 7, 1970); Oil, Chemical and Atomic Workers Local 4-243 v. NLRB [*Allied Chemical Corp.*], 124 U.S.App.D.C. 113, 116 362 F.2d 943, 946 (1966).

well within the scope of its expertise and discretion as far as it goes.[3]

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[3] The Board's opinion in this case made findings which meet the requirements subsequently set forth in *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969) (requiring a finding of more than simple bad faith in order to justify a Board order requiring an employer to bargain without an election). Over and above the finding of bad faith the Board found:

> In any event the Respondent's extensive Section 8(a)(1) violations, on which it embarked at about the time the Union attained its majority status *and which made a free and fair election impossible*, justify an order requiring the Respondent to bargain with the Union upon request as an appropriate remedy for the Respondent's 8(a)(1) violations. [Emphasis added.]

The italicized finding is similar to findings held by the Supreme Court to warrant enforcement of a bargaining order in the *Sinclair* portion of the *Gissell* case. 395 U.S. at 615.

In *Food Store Employees Union v. NLRB* [*Heck's St. Alban's*], 135 U.S.App.D.C. 341, 418 F.2d 1177 (1969), involving the same parties, this court remanded the case for reconsideration by the Board. At one point the Examiner in that case, rejecting the employer's contention that authorization cards were too unreliable as proof of majority status to permit a finding that the Union was the employee's designated bargaining representative, said:

> It is also a familiar rule of law that when the party calling for the best evidence of a fact has itself made the production of such evidence impossible, it cannot complain that proof of that fact is made by secondary, but probative, evidence. Here Respondent by its own actions made impossible the ascertainment of its employees' desires as to representation in the atmosphere of a free and fair election, and thus may not be heard to complain if that fact is ascertained through other probative evidence.

This court acknowledged that it was possible that the requisite findings were "implicit" in the Board's decision (135 U.S.App.D.C. at 348, 418 F.2d at 1184). However, the language quoted above was the only reference by the Board to the impossibility of free elections, and it appeared in the midst of a 21-page discussion of the case by the Trial Examiner, adopted, by reference, in the Board's opinion. It appeared as an additional evidentiary-type reason why majority status could be predicated on cards (then an undecided legal issue). There was no clear-cut finding of impossibility as a finding of ultimate fact with the intention that the finding be the predicate and justification for a bargaining order.

In the case at bar the Board explicitly found that the employer's violations of section 8(a)(1) has made free and fair elections im-

The Board found bad faith on the part of Heck's in refusing to bargain with the Union, basing that conclusion in part on "flagrant repetition of conduct previously found unlawful" at other Heck's stores.[4] Since 1964 Heck's has been the object of nine unfair labor practice proceedings,[5] which show, in the Board's words, "a labor policy in all of its stores that is opposed to the policies of the Act." The Board's findings of bad faith and flagrant misconduct lead us to remand this case to the Board for reconsideration, in light of our recent decision in *Tiidee Products*,[6] of the Union's request for further relief.[7]

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possible as one of the ultimate findings justifying the issuance of a bargaining order. That is all that *Gissell-Sinclair* contemplates, and there is accordingly no reason for our remand on other grounds to postpone the date on which the order becomes enforceable by contempt actions.

[4] Although the conduct referred to took place at other stores, the president and vice president of the company were involved in each of the disputes mentioned.

[5] *See* 150 NLRB 1565 (1965), *enforced per curiam*, 369 F.2d 370 (6th Cir. 1966); 156 NLRB 760 (1966), *enforced as modified*, 386 F.2d 317 (4th Cir. 1967); 158 NLRB 121 (1966) and 159 NLRB 1331 (1966), *consent decree entered* (4th Cir., No. 11,390, June 13, 1967); 166 NLRB 186 and 166 NLRB 674 (1967), *enforced as modified*, 390 F.2d 655 (4th Cir. 1968), *cert. granted*, 37 U.S.L.W. 3219 (1968); 170 NLRB No. 53 (1968), *enforced in part, remanded in part in light of NLRB v. Gissell Packing Co.*, 395 U.S. 575 (1969), 135 U.S.App.D.C. 341, 418 F.2d 1177 (1969); 171 NLRB No. 112, Nos. 22,183, 22,284, *remanded by order*, August 11, 1969.

[6] International Union of Electrical, Radio and Machine Workers v. NLRB [*Tiidee Products, Inc.*], Nos. 22,797, 22,911, 138 U.S.App. D.C. 249, 426 F.2d 1243 (April 3, 1970). The Board's order in the case before us was entered before our decision in *Tiideee Products, Inc.*

[7] The Union requested a broad range of further relief: the mailing of notices to employees (the Board's order called only for posting notices); a company-wide bargaining order; shifting of the burden of proof in future cases to require Heck's to show good faith in rejecting Union cards; injunctions under section 10(j) of the Act; greater Union access to employees; make-whole compensation for lost collective bargaining benefits; and Union expenses to overcome the effects of the Company's unlawful refusal to bargain.

The Board's application for enforcement of the order is granted. On the Union's petition for review, the case is remanded for proceedings consistent with this opinion.

So ordered.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 9-CA-4440
9-CA-4488
9-CA-4536
9-CA-4563

TIDEE PRODUCTS, INC.

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC

SUPPLEMENTAL DECISION AND ORDER

On February 24, 1969, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding, finding that Respondent had violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended.[1] The Board, *inter alia*, ordered Respondent to bargain with the Union upon request, but it did not grant the Union's proffered broader remedial order. The Union sought backpay to make the employees whole for wages and benefits lost due to Respondent's unlawful refusal to bargain, and reimbursement for lost initiation fees and dues.

Thereafter, on April 3, 1970, the United States Court of Appeals for the District of Columbia Circuit enforced in full the Board's Order.[2] However, upon the Union's petition for review of the Board's Order, the court remanded these cases for further proceedings not inconsistent with its opinion. The Board, having accepted the remand issued a notice to the parties requesting state-

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[1] 174 NLRB No. 103.

[2] *International Union of Electrical, Radio and Machine Workers, AFL-CIO* v. *N.L.R.B.*, 426 F.2d 1243 (C.A. D.C.), rehearing denied, F.2d (C.A. D.C) (September 21, 1970), cert. denied, 400 U.S. 950.

ments of position. The Union and Respondent each filed such statements.[3]

The Board has given full consideration to the views of the court of appeals as expressed in the instant proceeding and the parties' contentions in their respective statements of position. For the reasons more fully set forth hereinafter, the Board has concluded that it would effectuate the policies of the Act to grant some but not all of the requested additional relief.

The Union asserts that the court of appeals' conclusion that the Board has the power under the Act to issue a make-whole remedial order is the "law of the case." It contends, moreover, that under the circumstances of these cases the Board should exercise that power and either determine on the record before the Board what dollar amount, if any, is necessary to make whole each employee for all losses sustained due to Respondent's unlawful refusal to bargain or remand this proceeding to a Trial Examiner for a hearing to determine that question. The Union also seeks organizational expenses, litigation costs, reimbursement for lost initiation fees and dues, and any other remedies that would effectuate the policies of the Act.

Respondent contends that the court of appeals erred in questioning the Board's determination not to award additional relief. Respondent argues that no additional relief is warranted; it would have the Board merely reiterate its previously announced conclusion that the Act does not empower the Board to issue a make-whole order.[4]

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[3] The Union filed a motion to consolidate this proceeding with those cases comprising *Tiidee Products, Inc.*, 176 NLRB No. 133, enfd. and remanded, 440 F.2d 298 (C.A. D.C.). We find no merit in the Union's contentions and its motion is hereby denied.

[4] See *Ex-Cell-O Corporation*, 185 NLRB No. 20, enfd. *sub nom. International Union United Automobile, Aerospace and Agricultural Implement Workers of America, UAW* v. *N.L.R.B.*, 449 F.2d 1046 (C.A. D.C.) 449 F.2d 1058 (C.A. D.C), and *Heck's, Inc.*, 191 NLRB No. 146. In the aforementioned cases the refusals to bargain rested upon "debatable questions" concerning the validity of the underlying representation determinations whereas here the court of appeals found that Respondent raised a frivolous question when it objected to certain union preelection conduct allegedly affecting the

In its Decision, the Board found that Respondent had violated Section 8(a)(1), (3), and (5) of the Act. As a remedy for the 8(a)(5) violation, the Board ordered Respondent to bargain collectively with the Union upon request. The Board rejected the Union's request that in addition to the traditional cease-and-desist order Respondent be required to make the employees whole for monetary losses suffered as result of the unlawful refusal to bargain.

In *Ex-Cell-O* the Board majority enunciated its conclusion that Congress did not give the Board statutory authority to grant the compensatory monetary remedy requested by the Union. The court of appeals disagreed with this view of the scope of the Board's statutory remedial power and it remanded these cases to the Board for further proceedings not inconsistent with the court's opinion. Although the Board adheres to the views expressed in *Ex-Cell-O*, inasmuch as it has accepted the remand, it considers itself bound by the court's opinion as the "law of the case."

A close analysis of the court's opinion reveals that the court did not decide that the Board must issue a make-whole remedial order in these cases. It did, however, question the adequacy of the conventional bargaining order under the circumstances of this proceeding:

> We cannot discern, and the Board has not explained, on what basis it could or did conclude that its order under review is designed "to insure meaningful bargaining." [5]

The court noted that the bargaining order herein was "counter-productive" and actually rewarded Respondent's refusal to bargain during the critical period following the Union's certification as the collective-bargaining representative. Thus, the court stated, during the delay in bargaining Respondent enjoyed lower labor expenses and probably will continue to do so in the future because the

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results of the election and thereafter contested the Regional Director's refusal to order a hearing on the objection.

[5] 426 F.2d at 1249.

Union, probably having lost the allegiance of a majority of the unit employees, will not be able to bargain effectively. The court suggested that the Board consider other remedies to "prevent the employer from having a free ride during the period of litigation." [6] Finally, the court concluded that the bargaining order encourages frivolous litigation before the Board and the courts.

The court urged the Board to consider the advisability of a make-whole remedy:

> . . . which could be measured not by any sentiment as to what the parties *should* have agreed to, but only by a determination, on the basis of all the evidence available, of what it is likely that parties *would* have agreed to . . .[7]

had they engaged in the kind of bargaining required by the Act. But the court also entered a caveat that it was not suggesting that the make-whole remedy would be appropriate "under circumstances in which the parties would have been unable to reach agreement by themselves." [8] Finally, the court stated:

> . . . we accompany our remand with a directive to make supplementary findings in the event the Board determines on remand that it should not grant any make-whole relief in whole or in part. If the Board believes that alternative remedies,[15] beyond those already granted, are more appropriate, it should so state. The assessment of these matters is for the Board.

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[15] The scope of the Board's consideration on remand, if it is deemed that the Union's proposal goes too far, would include consideration of such lesser, alternative remedies as an award for excess organization costs caused by the Company's behavior, or for the costs of having to litigate a frivolous case, or for a combination of these.[9]

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[6] *Id.* at 1251.

[7] *Id.* at 1252.

[8] *Id.* at 1253.

[9] *Ibid.*

We have carefully considered the Union's request for a make-whole remedy in light of the record herein and have decided that it is not practicable. The Union suggests that we determine what the parties "*would* have agreed to" in 1967 and thereafter on the basis of a record which contains only a proposed collective-bargaining agreement submitted by the Union to Respondent on December 18, 1967; a chart comparing the wages then paid by Respondent for certain job classifications with those paid by other employers in comparable industries in the Dayton area who were then under contract with the Union; testimonial evidence of employee wage rates as of the date of the hearing herein and a list thereof as of May 25, 1970; certain testimony about the time required to negotiate a first contract; and several charts and tables depicting nationwide changes in wages and benefits since 1967. We know of no way by which the Board could ascertain with even approximate accuracy from the above what the parties "*would* have agreed to" if they had bargained in good faith.[10] Inevitably, the Board would have to decide from the above what the parties "*should* have agreed to." And this, the court stated, the Board must not do.

Alternatively, the Union suggests that the Board remand his proceeding to a Trial Examiner apparently without standards for a hearing to devise a "make-whole" formula for backpay to be awarded employees, if any. This would result in long delay while these cases wound their way through the Trial Examiner, the Board, and, ultimately, the courts. Meanwhile, Respondent, which is under order to bargain with the Union, is not likely to agree upon any new wage benefits for employees for fear that the Board would give them retroactive effect in devising a backpay formula for the past refusal to bargain. This would further delay the commencement of meaningful collective bargaining and thus not effectuate the purpose of the Act.

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[10] In his dissent, Judge MacKinnon noted, "the history of this case seems to make it clear that the most realistic prediction would be that the parties would not have agreed to anything. Any other conclusion is difficult to reach in light of the Company president's 'antiunion animus' and the 'patently frivolous' objections to the election." *Id.* at 1256.

However, while we find that it would be counterproductive to grant the Union's request for a remand to a Trial Examiner, the Board believes that the alternative remedies provided hereinafter will undo some of the baneful effects pointed out by the court as having resulted from Respondent's "clear and flagrant violation of the law." [11] They will, for one, aid the Union in rebuilding its strength so that it may bargain effectively with Respondent. Also, by requiring Respondent to pay some of the Board and union litigation costs occasioned by its misconduct, similar "brazen" refusals to bargain will be discouraged. Although these remedies are not theoretically perfect, we believe that they are as far as we can go in the circumstances.

1. In the ordinary unfair labor practice case, the notice to employees which accompanies the Board's order is posted for 60 days at the employer's place of business. However, to assure that the employees involved here fully and carefully read the notice, that Respondent's new employees unfamiliar with the history of the instant proceeding understand the reasons for the delay in collective-bargaining negotiations, and that the unit members realize that the Government protects their Section 7 right to select a collective-bargaining representative, we shall require that copies of the posted notices be mailed to each of the employees in the unit at his home.[12]

2. Given all the circumstances of the instant proceeding and those of *Tiidee Products, Inc., supra*, note 3, it is clear that the Union in essence will have to "reorganize" the unit employees despite its outstanding Board certification prior to commencing collective-bargaining negotiations with Respondent.[13] In order that the employees may

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[11] *Id.* at 1248.

[12] Cf. *Heck's Inc.*, 191 NLRB No. 146.

[13] We agree with our concurring colleague that the Board should neither concern itself with "how many dues-paying members the Union is able to obtain" nor "indicate that this impartial and neutral Agency has any view as to whether the employees ought to join or not join either this or any other union." However, our concurring colleague misconstrues the purpose of our Decision. All that we are doing is restoring to the duly certified collective-

have free and ready access to information from the Union concerning all aspects of unionization and the collective-bargaining negotiations which should occur in the immediate future, the Board will order that the Union be given reasonable access to Respondent's bulletin boards and other places where notices to employees are customarily posted, during the period of contract negotiations, for the posting of union notices, bulletins, and other literature.[14]

Similarly, and especially during the period prior to the commencement of negotiations, the Board finds that it would facilitate the Union's reclaiming the allegiance of the unit employees if it were able to meet with the individuals involved in order to explain to them the circumstances of the instant proceeding and the Union's plans for the future. While several methods for achieving this objective are available, we find least burdensome on all the parties the requirement that Respondent furnish the Union with a list of names and addresses of its employees and keep said list current for a 1-year period. Accordingly, we shall order Respondent to furnish the Union with such lists for 1 year from the date of this Supplemental Decision.

3. The Union asserts that an award to it of organizational expenses, litigation costs and expenses, and lost initiation fees and dues would meet another of the court of appeals' objections to the Board's order; *viz*, that our traditional remedy rewarded Respondent's delaying tactics and increased the likelihood that similar frivolous litigation would clog future Board and court calendars.

It is clear that the Union incurred no extraordinary organizational expenses because of Respondent's patently

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bargaining representative the opportunity to achieve again, via a readier route, what it had previously obtained by its own efforts, but then lost through Respondent's frivolous litigation. Moreover, as the court noted, our already enforced bargaining order would not insure meaningful collective bargaining unless the Union were given the opportunity to regain the allegiance of a majority of the unit employees.

[14] Cf. *Heck's, Inc.*, *supra*, fn. 20, and *J. P. Stevens & Co., Inc.*, 171 NLRB No. 163, enfd. 417 F.2d 533 (C.A. 5).

frivolous objection to the election and subsequent refusal to bargain. Despite certain already remedied preelection unlawful Respondent conduct, the Union was selected by the employees after a 2-month campaign at the first election held. We find, therefore, no nexus between Respondent's unlawful conduct here under examination and the Union's preelection organizational expenses and, accordingly, we shall not award them to the Union.

The Union asserts that because it is union policy not to collect initiation fees and dues until a contract is executed, it has received nothing from the unit employees throughout the course of this proceeding. It therefore now seeks to recover the initiation fees and dues lost due to Respondent's refusal to bargain. We view this claim as partaking of a request for a make-whole remedy, which we have declined to order, since presumably the dues and fees sought would have come from lost wages. Moreover, since it is union policy to chance the loss of initiation fees and dues in *all* cases until a contract is negotiated, if ever, we find no reason to have Respondent assume that risk at this point. Clearly, the Union during the instant proceeding could have elected to assess its members for dues and fees.[15]

We find merit, however, in the Union's request that it be reimbursed for certain litigation costs and expenses. Normally, as the Board recently noted, litigation expenses are not recoverable by the charging party in Board proceedings even though the public interest is served when the charging party protects its private interests before the Board.[16]

We agree with the court, however, that frivolous litigation such as this is clearly unwarranted and should be kept from the nation's already crowded court dockets, as well as our own. While we do not seek to foreclose access to the Board and courts for meritorious cases, we likewise do not want to encourage frivolous proceedings. The policy of the Act to insure industrial peace through collective bargaining can only be effectuated when speedy

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[15] See fn. 13, *supra*.

[16] *Heck's, Inc.*, *supra*, fn. 20.

access to uncrowded Board and court dockets is available. Accordingly, in order to discourage future frivolous litigation, to effectuate the policies of the Act, and to serve the public interest we find that it would be just and proper to order Respondent to reimburse the Board and the Union for their expenses incurred in the investigation, preparation, presentation, and conduct of these cases, including the following costs and expenses incurred in both the Board and court proceedings: reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diem, and other reasonable costs and expenses. Accordingly, we shall order Respondent to pay to the Board and the Union the above-mentioned litigation costs and expenses.[17]

As we have concluded that it would best effectuate the policies of the Act to require Respondent to take certain action in addition to the action previously ordered, we shall issue the following:

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Tiidee Products, Inc., Dayton, Ohio, its officers, agents, successors, and assigns, shall take the following affirmative action in addition to that previously ordered which the Board finds will effectuate the policies of the Act:

(a) Mail a signed copy of the attached revised notice marked "Appendix" to each of its employees immediately upon receipt thereof from the Regional Director for Region 9.

(b) Upon request of the Union, made within 1 month of the date of this Supplemental Decision, immediately grant the Union and its representatives reasonable access, for the period of the collective-bargaining negotiations, to its bulletin boards and all places where notices to employees are customarily posted.

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[17] See also Rule 38, Federal Rules of Appellate Procedure. Cf. *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 166; *Schauffler* v. *United Association of Journeymen*, 246 F.2d 867 (C.A. 3, 1957).

(c) Upon request of the Union, made within 1 month of the date of this Supplemental Decision, make available to the Union a list of names and addresses of all employees currently employed and keep such list current for a period of 1 year thereafter.

(d) Pay to the Board and the Union the costs and expenses incurred by them in the investigation, preparation, presentation, and conduct of these cases before the National Labor Relations Board and the courts, such costs to be determined at the compliance stage of these proceedings.

Dated, Washington, D.C. January 24, 1972

John H. Fanning, Member

Howard Jenkins, Jr., Member

Ralph E. Kennedy, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

CHAIRMAN MILLER, Concurring:

I concur fully with my colleagues in their conclusions as to what additional remedies should be ordered herein.

I have, however, somewhat separate views as to rationale, as indicated below.

The Union is entitled to bulletin board use, in my view, only as a remedy for the interruption in communication between the Union and the employees which has been occasioned by Respondent's frivolous resort to extended litigation. For the same reason, I concur in the order requiring that Respondent furnish the Union with a current list of employee names and addresses.

To the extent, however, that my colleagues indicate that their purpose in providing this remedy is affirmatively to ally this Board with the Union's "reorganizational" efforts, I must dissociate myself from their views. We have a legitimate purpose in implementing the original choice by the employees in selecting this Union as a bargaining agent and in assuring that there is full opportunity for communication with the employees. But it is not our function, as I see it, to concern ourselves with how many dues-paying members the Union is able to obtain, nor to indicate that this impartial and neutral Agency has any view as to whether the employees ought to join or not join either this or any other union. It is, therefore, *not* part of *my* reason for joining in these remedies, "to facilitate the Union's reclaiming the allegiance of the unit employees," as the majority puts it.

I would also differ with my colleagues, in some degree, with respect to their rationale for denying the requested relief for dues which it did not receive from employees. They seem to have been persuaded, in part at least, by the Union's policy of waiving dues and initiation fees during the organizational period. That, to me, is unimportant, and, furthermore, I would not wish to suggest that we might reach a different result if the Union had not had such a policy, since I do not think it proper for this Board, perhaps unwittingly, to allow our processes to influence unions in an area in which they should be free to make such policy choices wholly apart from any con-

siderations of how they might affect out determination in any Board proceeding.

In this area, too, my reason for denying the relief is simply that we have no legitimate interest in how many dues-paying members a union can attract. Our only interest, to repeat what I have said earlier in this opinion, is to implement the majority choice of representative which was made in the election. It is *not* to insure that the Union has either a large or small membership, nor that it should obtain from the work force a large or small amount of dues or initiation fees. We are *not* providing damages for any private interests of the Union which may have been injured by the illegal employer conduct or by its frivolous resort to litigation. We *are* protecting employees' Section 7 rights and the integrity of our own processes. But whether the Union or any other organization lost revenue as an incident of violations of our Act is relevant, if at all, only in a private law suit, and not in a forum designed only to protect and enforce public policy.

The reimbursement of the Union and the Board for costs and expenses is in a different category. Since violation of our Act can be asserted only by private parties' charges, if they are forced to make such charges and to participate in extended proceedings by a respondent's frivolous resistance to the orderly application of our Act, I believe this to be a suitable remedy and one necessary for the protection of the public interest.

Dated, Washington, D.C.

Edward B. Miller, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a trial in which both sides had the opportunity to present their evidence, the National Labor Relations Board has found that we violated the law and has told us to post and mail this notice about what we are committed to do.

The Act gives all employees these rights:

To organize themselves
To form, join, or help unions
To bargain as a group through a representative of their own choosing
To act together for collective bargaining or other mutual aid or protection
To refuse to do any and all of these things.

We assure all of our employees that:

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT threaten our employees with plant closure, or discharge, or with any other types of reprisals because they have selected International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, as their exclusive bargaining representative.

WE WILL NOT attempt to get employees to inform on the union activities and desires of their fellow employees.

WE WILL NOT unlawfully interrogate employees concerning their union membership, activities, or desires, nor will we unlawfully poll our employees in order to discover their sentiments about the Union.

WE WILL NOT lay off employees because they selected the Union as their collective-bargaining representative.

WE WILL NOT discharge employees because they selected the Union as their collective-bargaining representative.

WE WILL NOT discriminatorily change terms and conditions of employment because employees voted in favor of union representation, or in order to discourage membership in the Union.

WE WILL NOT refuse to bargain collectively with the above Union as the certified collective-bargaining representative of the employees in the following unit:

> All production and maintenance employees at our Dayton, Ohio, plant, excluding all office clerical employees, technical employees, guards, and supervisors as defined in the Act.

WE WILL NOT refuse to furnish the Union with information that will enable it to function as the bargaining representative of our employees in the above unit.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights under the Act.

WE WILL make whole Virginia Sawmiller and Wanda Reagan for any loss of earnings they may have suffered by reason of their discriminatory discharges.

WE WILL recall and make whole all employees who were discriminatorily laid off by us.

WE WILL notify any of our employees if currently in layoff status and if presently serving in the Armed Forces of the United States of their rights to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

WE WILL bargain collectively with the above Union as the duly certified collective-bargaining representative of our employees in the above unit and, if an understanding is reached, we will sign a contract with the Union.

WE WILL mail a signed copy of this notice to all our employees.

WE WILL grant the Union reasonable right to utilize our bulletin boards during negotiations.

WE WILL, upon the request of the Union, immediately give to the Union a list of names and addresses of all our employees, and WE WILL keep the list current for a period of 1 year.

WE WILL reimburse the Union and the National Labor Relations Board's General Counsel for their costs and expenses in connection with this proceeding.

TIIDEE PRODUCTS, INC.
(Employer)

Dated _____

By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provision may be directed to the Board's Office, Federal Office Building, Room 2407, 550 Main Street, Cincinnati, Ohio 45202, Telephone 513—684-3686.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1550

FOOD STORE EMPLOYEES UNION, LOCAL NO. 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

MOTION OF PETITIONER TO LODGE NEW DECISION OF NLRB

Now comes petitioner and respectfully moves for leave to lodge with the Clerk four copies (enclosed herewith) of the supplemental decision and order of the NLRB in a related case, *Tiidee Products Inc.*, 194 NLRB No. 198, following remand from this Court, *International Union of Electrical Radio & Machine Workers, AFL-CIO* v. *NLRB*, —— U.S. App. D.C. ——, 426 F. 2d 1423, rehearing denied, —— F. 2d —— (Sept. 21, 1970), cert. denied, 400 U.S. 950. The Board's supplemental decision and order was issued January 24, 1972, and reported unofficially January 31, 1972 (79 LRRM 1175), a month after petitioner's reply brief herein had been filed.

For the reasons set forth in the accompanying memorandum, this motion should be granted.

Respectfully submitted,

/s/ Mozart G. Ratner
MOZART G. RATNER
818 - 18th Street, N.W.
Washington, D. C. 20036

JUDITH A. LONNQUIST
201 North Wells Street
Chicago, Illinois 60606

CERTIFICATE OF SERVICE

Two copies of the foregoing Motion of Petitioner to Lodge New Decision of NLRB and accompanying Memorandum have been served by hand this 2nd day of March, 1972 upon:

Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue N.W.
Washington, D. C.

/s/ Mozart G. Ratner

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1971

No. 71-1550

[Filed Mar. 3, 1972, United States Court of Appeals for the District of Columbia Circuit, /s/ Nathan J. Paulson]

FOOD STORE EMPLOYEES UNION, LOCAL NO. 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Before: Bazelon, Chief Judge

ORDER

On consideration of petitioner's motion for enlargement of time for oral argument, and of the motion of petitioner to lodge a new decision of the National Labor Relations Board, it is

ORDERED that each side in the above case is allotted 40 minutes for oral argument rather than 30 minutes and it is

FURTHER ORDERED that petitioner's aforesaid motion to lodge a new decision of the National Labor Relations Board is granted.

[Received Apr. 1, 1972]

SUPREME COURT OF THE UNITED STATES

No. 73-370

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FOOD STORE EMPLOYEES UNION, LOCAL 347, ETC.

ORDER ALLOWING CERTIORARI—Filed December 3, 1973

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 530063 149